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Supreme Court of the United States

OCTOBER TERM, 1970

No. 1584

ROY DUANE CARLSON, Jr.,

Petitioner,

vs.

CITY OF TALLAHASSEE,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL

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I.

JURISDICTION

Respondent accepts petitioner's statement of jurisdiction.

II.

ISSUE

Whether a citizen has a constitutional right to force his way into and to display a provocative sign in a facility leased for the expression of political views by another citizen, when the display of such sign causes a serious threat of violence, and when an adjacent area has been set aside for the free expression of all opposing views.

III.
STATEMENT OF FACTS

Capital Stadium, located in Tallahassee, Florida, had been leased for the day and time of the petitioner's arrest to "Americans for Wallace" (T 4, 5 & 7). Petitioner attempted on three occasions to enter the stadium carrying a sign reading "Racism is destroying my Country" (T-17). Police officers assigned to duty at the stadium had been instructed by the United States Secret Service, which was assigned to Governor George Wallace, not to permit anything that looked like it might cause trouble (T-17).

Petitioner was advised by police officers of the City of Tallahassee that he would be arrested if he attempted to enter Capital Stadium carrying his sign (T-18), and was also advised by a police officer that, "I would like for you to leave the sign outside and go in like everyone else." (T-17).

When the petitioner tried to enter the stadium, a crowd began to gather. Several people actually threatened violence to the petitioner, and statements were made by members of the crowd to the effect that if the petitioner was admitted with the sign there would be a fight (T-18). On his third attempt to enter Capital Stadium, the petitioner did so by the use of force in pushing a police officer (T-34 and 35).

Thereupon the petitioner was arrested and charged with "Disturbing the Peace." The petitioner was convicted of this charge by a Judge sitting without a jury in the Municipal Court of the City of Tallahassee, Florida, and was fined $250.00.

A place had been provided adjacent to the stadium and upon the stadium grounds for those who wanted to demonstrate against the candidacy of Mr. Wallace. That place was in fact used by a large number of people opposing the candi-

dacy of Mr. Wallace, and they received police protection by the Police Department of the City of Tallahassee, Florida during their protest. This demonstration was without incident. (T-18 & 19).

IV

RECORD ON APPEAL

Respondent admits that the District Court of Appeal denied petitioner's motion to have the record on appeal transferred to this Court; however, the Respondent was advised that it could obtain a copy of the transcript and have the same certified by the Clerk of the District Court of Appeal. The respondent in its Appendix is furnishing this Court with the Trial Transcript. Petitioner has furnished the respondent with nothing other than his brief.

ARGUMENT

It should be recognized from the outset that this case does not involve a conviction for trespass or the interpretation of a trespass statute. Thus, Petitioner's repeated reference to the "trespass rationale below" has no basis in the record of this case. Petitioner was not charged with or convicted of trespass. Instead, he was given full and free access to the stadium on the same basis as all other persons in the audience. Not content to use the stadium on this basis, Petitioner insisted on displaying a very provocative sign calculated to arouse the passions of the audience. After Petitioner was repeatedly asked not to display this antagonistic sign, and after Petitioner tried to force his way into the stadium with the sign, he was arrested—not for trespass, but for disturbing the peace. To fully understand the basis for this arrest and the constitutional context in which this case arose, the following undisputed facts should also be recognized:

(1) At the time of Petitioner's arrest, the stadium was under lease to "Americans for Wallace," for the presentation of a speech by their presidential candidate, George C. Wallace;

(2) Following Petitioner's initial display of the sign, approximately twenty spectators threatened violence if Petitioner continued to display the provocative sign;

(3) Police officers assigned to duty at the stadium had been instructed by the United States Secret Service, which was assigned to Governor Wallace, not to permit anything that looked as if it might cause trouble or possible injury to the Governor and presidential candidate; and

(4) An area on the stadium grounds directly adjacent to the site of Candidate Wallace's speech had been provided for those who wished to demonstrate against the candidacy of Governor Wallace, which area was in fact used by a large number of people opposing the candidacy of Mr. Wallace, all of whom received police protection by the Respondent's Police Department during their protest, which continued throughout Governor Wallace's speech without incident. Petitioner was arrested only after the police recognized that his conduct had resulted in a very real threat of violence, which could easily have resulted in the total disruption of Candidate Wallace's speech, thereby totally frustrating the purpose for which the stadium had been leased.

With this understanding of the basic facts of the case at Bar, we can now analyze the cases cited by Petitioner in support of his petition for certiorari. The first two cases cited by Petitioner are *Marsh v. Alabama*, 326 U.S. 501, and *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, neither of which are applicable to the instant case. The *Marsh* case involved a situation in which a private corporation owned and governed an entire town. This town was no different from most other towns, except that its government was conducted

through the private corporation rather than through a municipal corporation as is usually the case. All areas of the town were open and accessible to the traveling public, the town being located adjacent to a four-lane public highway. The Appellant, Grace Marsh, was arrested and convicted of criminal trespass for distributing religious literature on the sidewalk near the post office. On appeal, this Court reversed, holding such arrest and conviction to be violative of the constitutional guarantees of freedom of the press and freedom of religion. In reversing, this Court pointed out that there was very little difference between the citizens of a town operating their government through a private corporation and their operating such government through a municipal corporation. This court noted that affirmance of the Appellant's conviction would be tantamount to approving the denial of freedom of the press and religion to vast numbers of American citizens who live in company towns, such as the coal mining towns of Kentucky and West Virginia.

The *Marsh* case differs from the case at Bar in at least the following respects:

(1) The present case does not involve any question of freedom of religion;

(2) The present case does not involve an arrest and conviction of criminal trespass;

(3) The present case does not involve an attempt to restrict freedom of expression throughout an entire town; instead, the Respondent, a municipal corporation, set up an immediately *adjacent* area specifically for the expression of opposing views, so that all citizens would be granted their right of free expression; and

(4) The present case involved a very real threat of violence which could have well prevented the free expression of views

by another citizen, to-wit: Candidate Wallace, who had leased the stadium for the specific purpose of expressing his views, while the conduct in *Marsh* was totally non-violent and did not pose a threat to the freedom of any other citizen.

The next case cited by Petitioner under his "trespass" argument is *Amalgamated Food Employees Union Local 590 et al. v. Logan Valley Plaza, Inc., et al.*, 391 U.S. 308. That decision involved the picketing of a super market located in a very large shopping center, the perimeter of which exceeded one mile. The number of pickets varied between four and thirteen, and averaged around six. The picketing was conducted almost entirely in the market's parcel pick-up area and in that portion of the shopping center parking lot immediately adjacent to such parcel pick-up area. The picketing was peaceful and was accompanied by no threats of violence, and congestion of the parcel pick-up area occurred very infrequently. The lower Court issued an injunction restricting the picketers from picketing and trespassing upon the super market's parcel pick-up area or any area in the shopping center. This injunction was affirmed by the Pennsylvania Supreme Court on the sole ground that the conduct of the picketers constituted a trespass on the property of the super market and the shopping center.

On appeal this Court reversed, holding that the state's generally valid trespass laws could not be used under these circumstances to restrict the picketers' right to peaceably assemble on property which was open and accessible to the general public. In so holding, this Court quoted extensively from *Marsh,* and relied heavily upon the constitutional rationale set forth in *Marsh,* pointing out that there was a great similarity between the shopping area in the company town involved in *Marsh,* which was open to the general public, and the shopping center owned by Logan Valley Plaza, Inc., which was also open to the general public. This Court was also careful to note that the conduct of the picketers was totally nonviolent, just as the conduct of the Petitioner in *Marsh* was

also totally non-violent. Thus, the *Food Employees* case is distinguishable from the case at Bar for the same reasons that the *Marsh* decision was distinguishable, as set forth above under the discussion of *Marsh.*

The only other cases cited by Petitioner are *Bachellar v. Maryland,* 397 U.S. 564; *Terminiello v. Chicago,* 337 U.S. 1; *Cox v. Louisiana,* 379 U.S. 536; and *Near v. Minnesota,* 283 U.S. 697, all of which are cited for the broad, general proposition that "expressions hostile to the recipients are equally protected by the Constitution." The Respondent agrees that free expression may not be restricted simply because some of the views being expressed are offensive to some of the recipients of such views; however, the Respondent would respectfully show that this general proposition has no application to the instant case and that the cases cited by Petitioner in support of this proposition are clearly distinguishable from the case at Bar.

The *Bachellar* case did not involve an attempted trespass upon public property which had been reserved for a private meeting. On the contrary, it occurred on an open sidewalk in front of a United States Army Recruiting Station in downtown Baltimore, Maryland. In *Bachellar,* this Court recognized that the convictions of the demonstrators could constitutionally have rested upon a finding that they sat or lay across a public sidewalk with the intent of blocking passage along it, or that the conviction could constitutionally have rested upon a finding that the demonstrators refused to obey police commands to stop obstructing the sidewalk. This Court reversed, however, not because the demonstrators were entitled to engage in such conduct, but because the jury's verdict could have been based upon an erroneous instruction. This Court in *Bachellar* specifically noted that the trial Judge instructed the jury that "disorderly conduct is the doing or saying or both of that which *offends, disturbs,* incites or intends to incite a number of people gathered in the same area." (*emphasis*

added) On these facts, and in light of this clearly erroneous instruction, this Court held the convictions of Bachellar and his co-defendants could not stand; but there is nothing in the case at Bar to even suggest that Petitioner's conviction could have been based upon the mere expression of unpopular views in a public place. Instead, the evidence is clear that his arrest and conviction was based solely upon his attempt to force his way into the privately leased stadium, as compounded by the clear threat of violence caused by this conduct.

The *Terminiello* case, *supra,* involved a situation in which Terminiello had rented an auditorium for the purpose of making a speech criticizing various political and racial groups whose activities he denounced as contrary to the nation's welfare. Other political groups, who were kept outside the auditorium, strongly criticized and protested Terminiello's speech, causing a disturbance which required police intervention. After his speech, Terminiello was arrested and charged with disorderly conduct under a Chicago city ordinance. At trial, the trial Judge instructed the jury that this ordinance was violated if defendant's speech "stirred people to anger, invited public dispute or brought about a condition of unrest."

On appeal, this Court reversed, holding that this instruction rendered the statute constitutionally invalid as applied to Terminiello, and that Terminiello could not be convicted of disorderly conduct simply for making a speech that invited public dispute or brought about a condition of unrest. However, when one compares *Terminiello* with the case at Bar, it becomes apparent that this decision just as aptly could be cited as support for the Respondent's actions in the instant case. The Respondent, City of Tallahassee, was trying to protect the right of Candidate Wallace to make his speech in a privately leased stadium, just as this Court held Terminiello was entitled to make his speech in a privately leased auditorium. The Respondent's Police Department attempted to assure this freedom of speech by providing an adjacent area for the expres-

sion of contrary views, thereby separating the opposing factions to minimize the chance of serious disturbance which could prevent either view from being heard. The same basic procedure was followed by the Chicago city police in *Terminiello* when they kept the protestors outside the auditorium in which Terminiello was speaking, a practice which found no disfavor with this Court in its decision in *Terminiello*. Instead, the sole constitutional defect in *Terminiello* was the jury instruction making it a crime merely to invite public dispute or to create a condition of unrest. In the present case, there was no jury and, therefore, no instruction to a jury; and there is no indication whatsoever that Petitioner's conviction could have been based upon the mere creation of public unrest.

In *Cox v. Louisiana, supra,* a civil rights leader was convicted of breach of the peace, obstructing public passages, and picketing before a Courthouse. The evidence in *Cox* clearly showed that the assembly by Cox and his followers was peaceful and orderly, but that Cox was arrested when he and his followers exceeded their allotted time for demonstrating. On appeal from his conviction, this Court reversed, holding that the breach of the peace statute, as construed by the state Court's definition of breach of the peace to mean "to agitate or disquiet," was unconstitutionally broad in scope, in that it allowed punishment merely for peacefully expressing unpopular views, and that his conviction for obstructing a public passage and picketing before a Courthouse was an unwarranted abridgement of his freedom of speech and assembly because the city authorities had the unbridled discretion to allow or disallow public meetings, and to set time limits for such meetings without regard to any reasonable standards, and without regard to any public duty. This Court in *Cox* repeatedly noted that city officials have both a duty and a responsibility to keep the peace and promote public safety. This Court's reversal obviously was not intended as a limitation on this duty and responsibility, but was simply an expression that personal rights and constitutional liberties may not

be restricted unless such restriction bears a reasonable relationship to the government's duty and responsibility to keep the peace, promote public safety, or some other valid governmental function. Obviously, the rationale of *Cox* has no bearing on the instant case, since the Respondent's actions were in pursuit of a valid governmental function, *i.e.*, the keeping of peace and order as a means of allowing all views to be openly expressed.

In *Near v. Minnesota, supra,* the last case cited by Petitioner in support of his argument, a newspaper entitled the "Saturday Press," repeatedly published editorials attacking certain local officials, including the local prosecuting attorney. This local prosecuting attorney then filed suit to enjoin and abate publication of the newspaper as a "public nuisance." After a trial, an injunction against further publication of the newspaper was put into effect. On appeal, this Court reversed, holding that such action violated freedom of the press as guaranteed by the United States Constitution. In so holding, this Court pointed out that actions of public officials were always open to public scrutiny and that the remedy for any abuses by the press should be found in the libel laws, not through the wholesale abatement of an entire newspaper as a public nuisance.

Obviously, the *Near* decision has no bearing on the case at Bar. The Respondent, City of Tallahassee, has made no attempt to enjoin or restrain the freedom of the press. Instead, the Respondent has simply tried in good faith to assure that *all* views could be freely expressed without any violence or public disturbance, which could restrict such free expression.

The Respondent does not minimize the delicacy or the seriousness of the constitutional issues raised by this case. The Respondent has been and continues to be fully aware of its duty and responsibility to allow the free expression of opposing views. However, the Respondent is also fully aware of its duty and responsibility to preserve the peace and thereby

provide an atmosphere in which such opposing views can be freely expressed by all citizens. When George Wallace, who is a somewhat volatile speaker himself, scheduled a political speech for Capital Stadium, the Respondent was charged with a public responsibility to preserve order so that this speech could be presented, especially since the stadium had been specifically leased by a private group for this purpose. The Respondent was also charged with a public and constitutional duty to allow free expression by those opposed to the views and candidacy of Mr. Wallace, even those violently opposed. To solve this apparent dilemma, the Respondent provided a forum for such opposing views on the stadium grounds immediately adjacent to the site of Candidate Wallace's speech. From the record, it appears that violence was avoided and that all views, representing opposite ends of the political spectrum, were freely expressed. Thus, the Respondent was able to discharge both its public and constitutional duties, to-wit: the preservation of order and the allowance of free expression of contrasting views.

If, however, the Respondent had allowed Petitioner and the other protesters to force their way into the stadium, the record shows that emotions were running so high that the result could well have been a riot, or at least a serious public disturbance, which could have prevented *anyone* from being heard. In this event, the Respondent would have failed in both of its public and constitutional duties, *i.e.*, the peace would not have been preserved and the Respondent would not have provided an adequate forum for the expression of opposing views.

The Respondent respectfully submits that there is no decision of this Court which required the Respondent to follow the latter alternative discussed above. Certainly, none of the decisions cited by Petitioner required such procedure. There are, however, many decisions of this Court which indicate that the Respondent was constitutionally correct in following the first alternative discussed above.

One such decision is *Taggart v. Weinacker's, Inc.*, 397 U.S. 223, in which this Court specifically recognized that freedom of speech is not absolute but is a relative right which may be regulated in furtherance of a valid public purpose. Specifically, this Court held:

> "The exercise of First Amendment rights may be regulated where such exercise would unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it." Id at 242.

The rationale of this holding is especially applicable to the instant case in which Petitioner was attempting to interfere with the normal use of public property which had been leased to a private group for use by that group.

The *Taggart* holding quoted above is merely a restatement and affirmance of the same general principal of constitutional law set forth in prior holdings of this Court. For example, see: *Adderley v. Florida*, 385 U.S. 39; *Cameron v. Johnson*, 390 U.S. 611; *Cox v. New Hampshire*, 312 U.S. 569; *Poulos v. New Hampshire*, 345 U.S. 395; *Kovacs v. Cooper*, 336 U.S. 77. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, this Court expressed this general constitutional principal as follows:

> "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Id at 502.

One common thread running through the cases cited by Petitioner as well as the additional cases cited in this brief has been the necessity of this Court applying a balancing test in order to properly resolve the delicate constitutional issues presented in each of these cases. In each case this Court has been called upon to balance the personal or constitutional

rights sought to be protected against the public rights or the private rights of another individual which were brought into conflict. In those cases relied upon by Petitioner, this Court correctly found that there was no valid public right or any conflicting private right sufficient to justify the deprivation of personal or constitutional liberties involved in each of those cases. However, in balancing such conflicting rights in each of the cases relied upon by Respondent, this Court found sufficient and overriding conflicting rights to justify the restrictions on other personal liberties involved in each of those cases; such conflicting rights in these cases took the form of either the state's right to preserve the peace and safety of its citizens or the right of some other individual citizen to exercise his civil rights.

When we bring the application of this balancing test forward to the case at Bar, we find that the Respondent, in effectuating the very minor deprivation of Petitioner's personal liberties, was actually trying to protect and preserve both categories of conflicting rights recognized by this Court in the cases relied upon by Respondent; that is, the Respondent was attempting to preserve the peace and protect the safety of its citizens from a riot or public disturbance while, at the same time, attempting to preserve the civil right of another citizen to express his views in a stadium which had been specifically leased for the expression of such views. Thus, it becomes apparent that, in the instant case, there were sufficient overriding considerations to justify the actions taken by Respondent.

If Petitioner's constitutional theory were accepted and carried to its logical conclusion, it would be very difficult for a private group to lease a facility for the presentation of views by a controversial speaker, such as Candidate Wallace, since an opposing philosophical faction could effectively prevent the expression of such views simply by invading the facility and causing a disturbance sufficient to prevent the presentation of any scheduled speeches. The Respondent in the present

case attempted to avoid such a denial of free expression by providing adequate forums for both philosophical groups with adequate police protection to assure that all views could be heard. Respondent now respectfully submits to this Court that such procedure is not prohibited by the Constitution and that Respondent has not violated Petitioner's First Amendment rights.

CONCLUSION

For the reasons stated above, Petitioner's petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of Respondent's Reply to Petition for Writ of Certiorari to the Florida District Court of Appeal and Appendix has been furnished to Maurice Rosen, Esq., c/o ACLU of Florida, 16924 N. E. 19th Avenue, North Miami Beach, Florida, and Richard Kanner, Esq., 1150 N. W. 14th Street, Miami, Florida, attorneys for Petitioner, by mail, this ..... day of May, A. D. 1971.

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